Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 78-220

SEYMOUR BRAVERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RICHARD H. KIRSCHNER, on behalf of SEYMOUR BRAVERMAN, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINION BELOW

The opinion of the Court of Appeals is reported at ___F.2d ___ (9th Cir. Nos. 77-2630/77-2720, July 10, 1978).

## JURISDICTION

The judgment of the District Court was entered on April 1, 1977. A timely motion for judgment of acquittal and/or a new trial was denied on July 5, 1977.

## QUESTIONS PRESENTED

1. Whether the United States Supreme Court should address itself to the issue of the propriety of the Allen charge in light of the conflict which exists between the Ninth Circuit and other Circuits, and the fact that the United States Supreme Court has not addressed itself to the Allen charge since the original Allen case in 1896?

Whether the giving of the Allen charge in the Ninth Circuit is tantamount to a denial of due process and equal protection in light of the fact that the Allen charge has been condemned and rejected by the Third, Seventh and District of Columbia Circuits, twenty-two state courts, and the American Bar Association?

Whether the trial court erred by giving the "Allen charge" over objection



and after the jury had been deliberating only for a short period of time?

2. Whether the restriction of cross-examination of key government witnesses amounted to a denial of due process?

3. Whether a court may refuse to grant a motion for new trial based upon the prosecution's failure to disclose a promise of immunity to a government witness?

4. Whether a trial court may fail to declare a mistrial or, in the alternative, strike highly prejudicial hearsay testimony upon a properly made motion?

5. Whether a trial court may refuse to receive in evidence a properly authenticated business record in conformity with Federal Rules of Evidence 803(6)?

## STATEMENT

On September 15, 1976, a 15 count indictment was filed charging Mr. Baverman in six counts with violations of 18 U.S.C. § 371 and § 1010. Co-defendants were named in the remaining counts. The first

trial commenced on January 25, 1977, and lasted 12 days. The jury returned a verdict of guilty as to count 6, not guilty as to count 14, and was unable to reach a verdict as to counts 1, 2, 7 and 11. The second trial commenced on May 16, 1977, lasted eight days and the jury returned a verdict of guilty on counts 1, 2, 7 and 11. Braverman was sentenced to 9 months, and pay a total fine of $10,000.00.

The Court of Appeals affirmed the convictions (Appendix A, infra).

1. The evidence at trial demonstrated that Subsidized Housing Corporation of America ("SHCA") was formed in early 1970 by defendant SEYMOUR BRAVERMAN ("Braverman"), and another co-defendant. SHCA began construction projects (hereinafter "new construction") under the auspices of the Department of Housing and Urban Development ("HUD"). In late 1970, co-defendant, Stanley Oschin ("Oschin") became associated with SHCA in the role of supervising rehabilitation projects under a new HUD program. Oschin



assumed full responsibility and took charge of what came to be known as the Rehabilitation Section of SHCA. Parenthetically, all criminal acts charged arose out of the Rehabilitation Section of SHCA. None of the criminal acts charged related to the new construction section of SHCA, with which Mr. Braverman was connected. During the course of the trial the evidence showed that the Rehabilitation Section was under the direct supervision of Oschin and operated in such a fashion as to require kick-backs from workers. This resulted in the payment of substandard wages, and in addition, false contracts were negotiated by Oschin with various subcontractors having a net result of kick-backs to Oschin. The thrust of the government's evidence was Oschin was directly responsible for these activities and shared his profits with Braverman and another co-defendant. During the course of the trial Baverman presented evidence to the effect that he and another co-defendant had entered into a partnership with Oschin, but that they did not share in knowledge of the

illegal activities of the Rehabilitation Section, nor in the running of that Section, nor in the actual profits generated by kick-backs, as alleged by the Government. Braverman presented evidence demonstrating the operations of the Rehabilitation and New Construction Sections were substantially different; and that separate and distinct offices were maintained for each with separate staffs. Braverman acknowledged having signed numerous checks and documents submitted to HUD; but he signed them without knowledge of their falsity, and without knowledge of any kick-back schemes. Independent evidence established that Braverman was occasionally called upon to sign various documents when Oschin was unavailable because Braverman was a corporate officer (HUD required the signature of a corporate officer), but that he did so in a hurried, perfunctory fashion without examining the documents or having any knowledge of the backup information supporting the documents. Additionally, evidence was presented that Oschin was not only stealing



from the Government and from various third parties, but was also embezzling from his partners, Braverman and another co-defendant as well. The posture of the evidence demonstrated that Oschin conceded he was responsible for the numerous malfeasances in the Rehabilitation Section of SHCA, but claimed he shared his profits with Braverman and another co-defendant. The defendants testified they had no knowledge of Oschin's schemes in the Rehabilitation Section, nor did they share in the illegal kick-backs received by Oschin. In fact, Braverman was a victim of Oschin's embezzlements.

During the jury's deliberations in each trial, the Court saw fit, over objection, to give the Allen Instructions on each occasion. The charge was given the jury in spite of the fact it had only been deliberating for a matter of hours.

FBI Agent Santala testified that Braverman stated during an interview that he knew Oschin was not paying prevailing wages to certain laborers. (RT

827-838) [1/] Agent Santala was unable to testify to this interview from memory and found it necessary to read from a prepared "302" witness interview report. The thrust of cross-examination was designed to illustrate that Santala had made a mistake in the preparation of the "302." The agent's testimony, if left unimpeached, was devastating. The Court refused to allow the impeachment to occur. When Santala presented Braverman with a written statement to sign reflecting this alleged statement, Braverman immediately informed Santala a mistake had been made, and he had not told Santala that he was aware Oschin was failing to pay the prevailing wage; rather, he told Santala that he had said that he and Oschin had an argument over Oschin's failure to submit prevailing wage statements to HUD -- not that he knew Oschin was failing to pay the prevailing wage.

[1] All reference to the Reporters Transcript will hereinafter be referred to as "RT."



This was completely consistent with Braverman's earlier statement to HUD investigators denying knowledge of Oschin's failure to pay the prevailing wage. It was imperative for the defense to demonstrate that Santala had prepared the case in a haphazard fashion and indeed had made a mistake with respect to what he thought Braverman had told him and what he had written in his "302." Santala's credibility and motivation were an issue and of substantial significance.

Santala testified this had been his first case; he had no independent recall of his interview of Braverman; he had to rely upon his "302"; he did not take extensive notes of the interview; it was his practice to take notes which consisted basically of "names, dates, places and key words"; that he had destroyed these notes. He also admitted that mistakes had "cropped up" in his interviews in the past. (RT 36 - 64). He further admitted that prior to filing of the criminal charges in this case he nad not reviewed all of the

documentation. (RT 48). Specifically, although he had a signed statement from Braverman in his possession which had been obtained from HUD, he had not reviewed it prior to the filing of criminal charges! This statement contradicted the alleged statement attributed in his "302". (RT 48). Additionally, Agent Santala had made a request for certain handwriting comparisons to be made by the FBI laboratory in Washington, D.C. When that request was made, it emphasized the fact that Mr. Santala apparently felt: "Confirmation of the signatures of . . . and Seymour Braverman are necessary to gain a conviction in this case." (RT 48). Mr. Santala denied that his purpose in making this request was to influence the findings of the handwriting examiner. Santala further admitted that he had interviewed Stanley and Philip Oschin together, and that during the course of FBI training he had learned that this was not a "good idea." The Court refused to allow the defense to ask Santala whether he prepared the memorandum of interview



with Braverman with the same care, thoroughness, and impartiality as he investigated the rest of the case. (RT 50-51). During a sidebar conference it was argued to the Court that this particular line of questioning was most relevant to whether or not Mr. Santala had made a mistake when he prepared the memorandum of interview with Braverman. (RT 52). The prosecutor's retort was: "What's the relevance of whether he was thorough or did a lousy job?" (RT 53). The Court embraced the prosecutor's comment and refused to allow the defense to explore this issue.

In both trials during the course of cross-examination, Stanley Oschin invoked his Fifth Amendment privilege with respect to questions relating to his tax liability for kick-back money. At the second trial, upon the invocation of his Fifth Amendment privilege, the defense moved to strike his direct testimony in its entirely. The prosecution hastily obtained immunity from tax prosecution for Oschin and he answered tax related questions. (RT 14-19). The Court re-

fused to allow cross-examination of Mr. Oschin regarding his state of mind concerning his invocation of the Fifth Amendment, his subsequent immunity grant, and the effect these would have on the prosecution's recommendation regarding his sentence.

2. On appeal, Braverman raised among others the following assignments of error: (a) That the District Court erred in severely limiting and restricting the cross-examination of key government witnesses; (b) that the trial court erred by prematurely giving the Allen Charge over objection, and in the face of request for Devitt and Blackmar Alternate Form Instruction when jury fails to agree, No. 18.15; (c) that the trial court erred in failing to declare a mistrial or, in the alternative, strike highly prejudicial hearsay testimony; (d) that the trial court erred when it refused to grant a motion for new trial based upon the prosecution's failure to disclose a promise of immunity to an important government witness; (e) that the trial court erred by failing to re-



ceive into evidence a properly authenticated business record pursuant to Federal Evidence Code 803 (6).

The Court of Appeals nevertheless affirmed the judgment, holding that "the modified Allen charge seems close enough to our Sullivan v. United States, 414 F.2d 714 (9th Cir. 1969)," without addressing itself to the issue of the propriety and continued vitality, if any, of the Allen Charge. Likewise, the Court perfunctorily dismissed the other issues raised on appeal.

## REASONS FOR GRANTING THE WRIT

A disagreement exists amongst the various Circuits concerning the constitutionality and propriety of the Allen charge. A resolution of whether or not the Allen charge is constitutional, and an ultimate resolution of the split among the various Circuits can only be accomplished by a decision of the United States Supreme Court directed to the constitutionality of the Allen charge.

Additionally, the Court of Appeals holding drastically undermines a defendant's right to confrontation and cross-examination.

1. The Allen charge constitutes a violation of the Due Process and Equal Protection clauses of the Constitution.

The Allen instruction has recently been subjected to a withering barrage of attacks, largely on the grounds that it is coercive or inaccurate. Although no opinion of the United States Supreme Court has addressed a challenge to this charge since the original Allen case, the Third, Seventh and District of Columbia Circuits have rejected it, and at least 22 states have disapproved the instruction. Recently the California Supreme Court scathingly rejected the Allen Charge. 2/ Likewise, the American Bar Association has recommended abandonment of the charge. (ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by

2/ People v. Gainer, ___ Cal.3d ___ (19660 -- Aug. 31, 1977).



Jury (approved draft 1968), Standard 5.4.) Moreover, many decisions which tolerate continued use of the charge have done so grudgingly under compulsion of stare decisis, or have sought to place curbs on its use. These restrictions often take the form of limiting the charge to the original language approved in Allen, or requiring "balancing" instructions. See, Note, On Instructing Deadlocked Juries, 78 Cal. Yale L.J. 100 (1968). In 1969, the Ninth Circuit recognized that even in its most acceptable form, the Allen Charge "approaches the ultimate permissible limits. Sullivan v. United States, supra. In 1977, the Ninth Circuit concluded that "permitting it [Allen Charge] to be given twice in a federal prosecution would be an unwarranted expansion of its use," and adopted a per se rule. United States v. Seawell, 550 F.2d 1159, 1162 (9th Cir. 1977). Furthermore, in United States v. Contreras, 463 F.2d 773 (9th Cir. 1972), the Ninth Circuit recognized the proposition that the Allen Charge,

when given prematurely, constitutes error. In the case at bar, where the jury had deliberated less than a full day, the Court should have given the Devitt & Blackmar Alternate to the Allen Charge, which had been requested by defense counsel. The Seawell court rendered its decisions and specifically found it "unnecessary" at that time to reexamine previous decisions upholding the content, timing and circumstances surrounding the Allen Charge. (At p. 1162) It is respectfully submitted that now is the time for the United States Supreme Court to do so.

The defects of the Allen instruction can be isolated into two elements. The first and most questionable feature is the discriminatory admonition directed to minority jurors to rethink their position in light of the majority view. The second element is the direction given by the trial court that "...like all cases, this case must be disposed of some time. Nor does there appear any reason to believe that the case can be tried again, by either side, more clear-



ly or more exhaustively than it has been tried before you." The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and arguments in open court. Sheppard v. Maxwell, 384 U.S. 333 (1966). This rule applies no less to juries than to judges, and decisions of this Court reflect the importance of restricting the foundation for the jury's decision to the evidence and arguments presented at trial. See Irvin v. Dowd, 366 U.S. 717 (1961), and Turner v. Louisiana, 379 U.S. 466 (1965). An equally significant principle relates to the right of both the prosecution and the defense to the individual judgment of each juror on the issue of guilt. The one or more "hold out" jurors are told that in reaching their independent conclusions as to whether or not reasonable doubt of the defendant's guilt exists, they are to weigh not only the arguments and evidence, but also their own status as dissenters -- a consideration both rationally and legally irrelevant to the issue of guilt. They are thus deflected

from their proper role as triers of fact, as effectively as if they had been instructed to consider their doubts as to guilt in light of their own prejudices or desires to go home. Moreover, unanimity requires that each juror must vote for and acquiesce in the verdict. Acquiescence simply because the verdict has been reached by the majority is not an independent judgment, and if permitted would undermine the right to a unanimous verdict. The open encouragement given by the Allen Charge to such acquiescence is manifestly incompatible with the requirement of independently achieved jury unanimity.

The portion of the instruction indicating that "the case must at some time be decided" is simply erroneous. It is not true that a criminal case must at some time be tried. The possibility of a hung jury is an inevitable by-product of our unanimous verdict requirement. Confronted with a mistrial, the prosecution retains the authority to request dismissal of the action. Moreover, this option is frequently ex-



ercised, when the prosecution concludes that its inability to obtain a conviction stemmed from deficiencies in its case. Thus, the inconclusive judgment of a hung jury may well stand as a final word on the issue of a defendant's guilt.

2. The trial court's restriction of cross-examination of key government witnesses violated defendant's Sixth Amendment right to confrontation.

In Davis v. Alaska, 415 U.S. 308 (1974), Mr. Chief Justice Burger set forth the applicable standard:

> "Cross-Examination is a principle means by which the believeability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story, to the witness' perceptions and memories, but the cross-examiner has traditionally been allowed to impeach i.e. discredit the witness.
>
> ***
>
> "The partiality of a witness

is subject to exploration at trial, and is always relevant as discrediting the witness and effecting the weight of his testimony. We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. [Citations omitted.]" (At 415 U.S., p. 316-317.

In the case at bar, Philip Oschin and FBI Agent Santala's credibility were critical to the Government's case. The defense was denied the opportunity to test that credibility by exploring the witnesses' motivations for testifying.

3. The trial court erred in denying a motion for new trial on the grounds that the Government failed to disclose a grant of immunity to a key government witness until after the jury began its deliberations.

The brother of a co-defendant testified on behalf of the Government. The testimony provided a crucial link in



the Government's conspiracy theory. The record reveals the prosecution failed to disclose the grant of immunity to this witness until after the commencement of the jury deliberations (CT 154).

The Supreme Court has resolved this issue against the prosecution in Giglio v. United States, 405 U.S. 150 (1972). In Giglio, the prosecution failed to disclose a promise of immunity made to a material witness. The Giglio court recalled the mandate of Brady v. Maryland, 373 U.S. 83 (1963), that a new trial must be awarded if material evidence had been suppressed, "irrespective of the good faith or bad faith of the prosecution," and concluded that failure to disclose the immunity promise constituted a suppression of material evidence necessitating a new trial.

4. The trial court's failure to strike prejudicial hearsay testimony amounted to a denial of the confrontation.

The prosecution inquired of a witness

concerning a conversation she overheard between Stanley Oschin and an attorney, Paul Migdal (RT 31-32). The inquiry was made notwithstanding the fact the conversation occurred in the absence of defendants; and the conversants were not co-conspirators. The witness testified she overheard a conversation between Oschin and Migdal wherein it was stated, "you know that you're doing everything wrong. You're fooling around with Government money," and "you know the FBI is going to be in on it and you'll all go to jail." (RT 31-32). The prosecutor readily acknowledged during the trial that there was no viable theory for the admissibility of this evidence and stated, "as soon as I discovered that the other parties weren't present, within two -- a couple of questions after that I left the matter alone." (RT 32). The trial court refused to strike this highly prejudicial testimony.

5. The court erred in failing to



receive a documentary exhibit after a proper foundation had been laid which exhibit graphically demonstrated the embezzlement practices Oschin perpetrated upon Braverman.

The mandate of Rule 803(6), Federal Rules of Evidence, was met with respect to the proffered exhibit. (RT 1993). It was established that the proffered exhibit was (1) a document prepared in the regular course of business, and further the preparer of the document was prepared to testify to its authenticity. Nevertheless, the court excluded the proffered exhibit. Inasmuch as the essential foundational requisites had been established and no evidence was proffered questioning the trustworthiness of the exhibit or the witness, the trial court erred by failing to admit the exhibit into evidence. Its significance was critical since it corroborated the defendant's claim that Oschin was cheating him as well as the Government.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD H. KIRSCHNER
A Professional Corporation

RICHARD H. KIRSCHNER



# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 10 1978

EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>SEYMOUR BRAVERMAN,<br>MORTON L. RUBIN,<br>Defendants-Appellants. | Nos.<br>77-2630<br>77-2720<br><br>MEMO-<br>RANDUM |

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS and ANDERSON, Circuit Judges, and CALLISTER,* District Judge

The judgments of conviction are affirmed.

The denial of the motion to sever was within the trial court's discretion and not abused. Likewise, was the restriction on cross-examination.

The modified Allen charge seems close enough to our Sullivan v. United

States, 414 F.2d 714 (9th Cir. 1969).

The objections about hearsay testimony, the rejection of a defense exhibit, and the "read-back" instruction are without merit.

---

*Honorable Marion J. Callister, United States District Judge, District of Idaho, sitting by designation.

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*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

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UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-2) is not reported.

### JURISDICITON

The judgment of the court of appeals was entered on July 10, 1978. The petition for a writ of certiorari was filed on August 8, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in giving an *Allen* charge.

2. Whether the trial court's decision to restrict cross-examination of two government witnesses requires reversal of petitioner's conviction.

3. Whether the district judge committed reversible error in denying a motion for a new trial, where such motion was based on the ground that the government failed to disclose a grant of immunity to a government witness until after the jury began its deliberations.

4. Whether the trial court erred in not declaring a mistrial or striking allegedly prejudicial hearsay testimony.

5. Whether the trial judge improperly excluded from evidence an alleged "business record" proffered by the defense.

## STATEMENT

Following two jury trials[1] in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiring to make false statements and to defraud the United States Department

[1]On September 15, 1976, a 15 count indictment was filed against petitioner and four other defendants. Prior to the two trials in this case, two of the named co-conspirators, Stanley Oschin and his son Phillip Oschin, entered guilty pleas and testified for the government. Petitioner and defendant Morton L. Rubin were tried together, despite their objections and various motions to sever. On February 11, 1977, after a 12-day jury trial (1st trial), petitioner was convicted on count six and his accomplice, Rubin, was convicted on count seven, while both were acquitted on count fourteen. The jury was unable to reach a verdict as to the remaining counts: counts one, two, seven and eleven for petitioner; counts one, two and eleven for Rubin (R. 345). On May 31, 1977, after an eight-day jury trial (2d trial) on the remaining counts, petitioner was convicted on counts one, two, seven and eleven; Rubin was convicted on count one, acquitted as to count eleven, and count two was dismissed as to him prior to the retrial (R. 348).



of Housing and Urban Development ("HUD"), Federal Housing Administration ("FHA") in violation of 18 U.S.C. 371, and on four counts of aiding and abetting the making of false statements to HUD-FHA in connection with the acquisition of loan insurance, in violation of 18 U.S.C. 1010. The court of appeals affirmed petitioner's conviction and sentence (Pet. App. 1-2).[2]

In 1970, HUD greatly expanded its programs to revitalize deteriorating housing in the urban areas of the United States. Under these programs, housing developers were given financial incentives to purchase and rehabilitate existing structures primarily for habitation by lower income families. See 24 C.F.R. Parts 221, 235 and 236. Essentially, HUD would act as the project guarantor so that if the project fell into financial difficulties HUD would assume the mortgage and indemnify the lending institution financing the project (Tr. 408-418). In order to supervise these projects, HUD required the project sponsors and contractors to submit periodic cost certifications during the progress of the rehabilitation program. See, *e.g.*, 24 C.F.R. 221.550a-221.553. If these certifications were approved by HUD, the lending institution would be authorized to disburse further guaranteed progress payments to the contractor so that the architect, subcontractors, and laborers could be paid and the projects completed (Tr. 422-426).

Since petitioner does not challenge the sufficiency of the evidence supporting his conviction, the testimony may be summarized briefly. From 1971 through 1974,

[2]Petitioner was sentenced to nine months' imprisonment on the conspiracy count. The district judge suspended sentence on the other counts, imposing a five-year period of probation on petitioner, to be served consecutively to the prison term, with a condition that petitioner render at least 200 hours of voluntary community service. Finally, petitioner was fined a total of $10,000.

petitioner and his associates, jointly doing business as Subsidized Housing Corporation of America ("SHCA"), contracted with HUD to perform rehabilitation construction work in connection with four HUD sponsored multiple-dwelling projects (Tr. 1352-1395, 1732-1733). During the course of the projects, petitioner and his co-conspirators submitted signed certificates to HUD, which purported to reflect the actual costs incurred during the rehabilitation construction phases of the housing projects. In fact, however, the costs submitted grossly overstated SHCA's expenses. Substantial portions of the monies paid to the architect, subcontractors, and laborers on SHCA projects were kicked back to petitioner and his co-conspirators (Tr. 1060-1063, 1071-1095, 1001-1018, 1132-1139, 1194-1232, 1236-1239, 1721-1722, 1737-1743, 1747).

Thus, co-conspirator Stanley Oschin, who pleaded guilty to two false statement counts and thereafter testified for the government (Tr. 1350-1352), thoroughly implicated petitioner in the planning and operation of the kickback scheme. Oschin was SHCA's construction supervisor and a partner of petitioner's (Tr. 1354-1366). He described how the partnership misleadingly issued payroll checks to laborers in amounts reflecting union scale wages, cashed the checks for the laborers, and, as part of the laborers' condition of employment, received back a significant percentage of the check amounts in cash. These kickbacks were then distributed to the three partners, including petitioner (Tr. 1366-1369, 1373-1378). Similarly, petitioner and his partners arranged a kickback scheme with the projects' architect (Tr. 1382-1386) and with certain subcontractors who would, after successfully bidding for an SHCA contract, enter into a much higher contract, just below the maximum allowed by HUD regulations. The difference between the actual bid and the cost certificate forwarded to HUD would then be split



between the subcontractors and the co-conspirators (Tr. 1378-1382), although some of the subcontractors claimed never to have received their share (Tr. 1063, 1072). As a result of these machinations, the HUD cost certificates, which were signed and/or submitted by petitioner and his partners, were falsely inflated (Tr. 1392-1422). Oschin's testimony was corroborated and supplemented by numerous witnesses, including many of those who had been forced to kick back either their wages or contract payments (*e.g.*, Tr. 1194-1232, 1236-1239, 1001-1018, 1060-1063, 1071-1095, 1132-1139, 1721-1722, 1737-1743, 1747).

## ARGUMENT

1. Petitioner contends (Pet. 14-19) that the use of a modified *Allen* charge[3] at each of his two trials below (Tr. 89-96, 104-112; see note 1, *supra*) denied him due process of law. However, petitioner was not denied a fair trial, since the challenged supplemental instructions were scrupulously fair and were given only after the jury *sua sponte* reported a deadlock despite lengthy deliberations.[4] See, *e.g.*, *United States* v. *Robinson*, 560 F. 2d 507, 517 (2d Cir. 1977) (*en banc*), cert. denied, 434 U.S. 1050 (1978); *United States* v. *Bailey*, 480 F. 2d 518 (5th Cir. 1973) (*en banc*).

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[3]See *Allen* v. *United States*, 164 U.S. 492 (1896).

[4]The charges were given following three and two days of jury deliberations, respectively (R. 344-345, 347-348). Since the jury had expressly stated that it was deadlocked after such substantial attempts to reach unanimity, there is no merit to petitioner's claim (Pet. 16) that the *Allen* type charges were given prematurely. See, *e.g.*, *United States* v. *Seawell*, 550 F. 2d 1159, 1162 n.6 (9th Cir. 1977) (citing cases).

The charges, which were identical, encouraged the jurors to reach a verdict, but only "if you can do so without violence to individual judgment" (Tr. 93, 95, 109, 111). Similarly, the court instructed the jurors that "you should not surrender your honest convictions * * *" (Tr. 93, 109) and that "no juror is expected to yield a conscientious conviction * * *" (Tr. 94, 111). Nor was the charge unbalanced. Indeed, the court seemingly favored petitioner by stating:

> If *much the greater number of you are for a conviction*, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one * * *.
>
> On the other hand, if *a majority or even a lesser number of you are for acquittal*, other jurors ought seriously to ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgment which is not concurred in by many of their fellow jurors * * *.

(Tr. 93-94, 110) (emphasis supplied). Moreover, the judge repeatedly reminded the jurors that the government had to establish petitioner's guilt beyond a reasonable doubt (Tr. 94, 95, 110, 111). Finally, it should be noted that at both trials the jurors continued to deliberate after hearing the *Allen* charge and ultimately convicted petitioner and his co-defendant of some charges and not others. In sum, there is no merit to petitioner's claim that his conviction was coerced by the modified *Allen* charge given here.

Petitioner notes (Pet. 14-15) that there is an apparent conflict among the courts of appeals concerning the traditional *Allen* charge. Four courts of appeals, in the exercise of their supervisory powers, have directed that the *Allen* charge not be given except in a substantially modified form. See *United States* v. *Angiulo*, 485 F. 2d 37



(1st Cir. 1973); *United States* v. *Thomas*, 449 F. 2d 1177 (D.C. Cir. 1971); *Government of the Virgin Islands* v. *Hernandez*, 476 F. 2d 791 (3d Cir. 1973); *United States* v. *Chaney*, 559 F. 2d 1094 (7th Cir. 1977). While the modified charge given here arguably does not comport with the supervisory standards enunciated in those circuits, the Ninth Circuit continues to approve the more traditional *Allen* type charge. See, *e.g.*, *United States* v. *Seawell*, 550 F. 2d 1159 (9th Cir. 1977). More importantly, no court of appeals has held that the *Allen* charge in its traditional form violates any constitutional right. And all the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict.

The differences among the courts of appeals reflect an ongoing reexamination of the precise wording of a proper supplemental instruction and do not warrant review by this Court. Indeed, the Court has recently denied certiorari in several other cases presenting a similar issue. *E.g.*, *Carter* v. *United States*, cert. denied, No. 77-1326 (June 12, 1978); *Dyba* v. *United States*, cert. denied, 434 U.S. 830 (1977); *Perez-Vega* v. *United States*, cert. denied, 424 U.S. 970 (1976); *Lee* v. *United States*, cert. denied, 422 U.S. 1044 (1975).

2. Petitioner further contends (Pet. 19-20) that the trial court unconstitutionally restricted his right to cross-examine certain witnesses. These alleged Sixth Amendment violations arose in connection with petitioner's attempted cross-examination of co-conspirator Stanley Oschin and his direct examination of his own witness, FBI Agent Santala (Tr. 1908, 36).

As regards the latter, the court, after listening to counsel's arguments, ruled that defense counsel could not ask Agent Santala the following question (Tr. 58):

> Now, did you investigate and prepare this case with the same degree of care, thoroughness and impartiality as you prepared the memorandum of interview with Mr. Braverman that you were just reading from?

Even assuming that the Sixth Amendment right of confrontation applies equally to a defendant's own witness, there is no merit to petitioner's claim.

The rejected question was repetitive, argumentative and irrelevant. Defense counsel had already succeeded in effectively attacking the reliability of both Agent Santala and his report. Thus, Santala had admitted that he relied on his report as past recollection recorded, that the report was prepared from notes that were not extensive, that "mistakes do crop up in those kinds of interviews," and that petitioner had denied the accuracy of the report when confronted with it at a subsequent interview (Tr. 1908-1929, 36-63). Similarly, defense counsel was able to elicit the agent's failure to interview properly and his ignorance of certain seemingly important facts in preparing his case report (Tr. 1914, 1921-1923, 49, 59-61). The jury was therefore fully able to evaluate Santala's thoroughness as it bore on the reliability of his testimony. Moreover, whether Santala was careful in preparing this case was irrelevant, since petitioner was to be judged on the evidence adduced at trial—not Santala's performance in the field. In these circumstances, the trial court properly exercised its broad discretion to preclude petitioner's "repetitive and unduly harassing interrogation" of Santala. See *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974).

Nor is there any merit to petitioner's claim concerning the cross-examination of government witness Stanley Oschin. Defense counsel asked Oschin whether he understood "that by invoking the Fifth Amendment you have perhaps minimized the extent and value and quality



of your testimony to the United States?" Before the prosecution could object, Oschin answered "I wouldn't know" (Tr. 21). Since this answer was never struck from the record, any error in the judge's subsequent decision to sustain an exception to this question was without prejudice to petitioner. Moreover, the trial court's ruling was a correct exercise of its broad discretion to control cross-examination. See *Davis* v. *Alaska, supra*. The question was patently irrelevant and also repetitive, since prior cross-examination had already fully established Oschin's plea bargain with the government, his involvement in the kickback scheme and his failure to report the income generated by the illicit kickbacks on his tax returns (see, *e.g.*, Tr. 1459-1477, 1540-1548, 19-25; see generally Tr. 1459-1659).

3. Next, petitioner claims (Pet. 20-21) that he was denied a fair trial by the government's failure to disclose a grant of immunity to one of its witnesses until the jury began deliberations in his first trial. However, since the undisclosed grant of immunity, which involved Irving Rubin, brother of petitioner's co-defendant, was not material within the meaning of *United States* v. *Agurs*, 427 U.S. 97 (1976), petitioner is not entitled to a new trial.[5]

In *United States* v. *Agurs, supra*, this Court established that where a defendant did not make a specific *Brady* request, innocent government nondisclosure of exculpatory evidence would result in conviction reversal

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[5]We note that the *Brady* question (*Brady* v. *Maryland*, 373 U.S. 83 (1963)) might not even be reached here, since defendant Rubin was most likely aware of the immunity status of his brother, whose testimony belied his true allegiance. Actual possession of that information would preclude any *Brady* relief. See *United States* v. *Brown*, 562 F. 2d 1144, 1151 (9th Cir. 1977).

only when the nondisclosure could be described as "material." *Id.* at 108-113. Materiality was further defined in terms of the

> overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record.

*Id.* at 112 (footnote omitted).

Application of the *Agurs* standard of materiality to the record as a whole reveals that petitioner's claim is without merit. Rubin, while technically a government witness, testified as evasively as possible in an obvious effort to support the defendants' joint claims of innocence. Thus, Rubin testified that while he frequently talked with his brother about business, they never discussed kickbacks (Tr. 1705-1707, 1714-1715). Simultaneously, consistent with the defendants' stratagem of painting themselves as the innocent dupes of their partner, Rubin pictured Oschin as the real culprit (Tr. 1708).

Given the exculpatory nature of Rubin's testimony, petitioner undoubtedly would not have attempted to impeach him by showing that Rubin had sought immunity concerning his knowledge of, and involvement with, his brother's supposedly legal activities. Indeed, petitioner made no effort to reopen the evidence or stipulate the fact of immunity to the jury at the time he learned of its existence. Moreover, at his second trial, not only did petitioner not impeach Rubin with regard to his immunity, but also the defense objected to this information being elicited by the government on redirect examination (Tr. 17-28 to 17-30). Since petitioner chose as



a matter of trial tactics to consider the grant of immunity as immaterial—indeed inculpatory—he cannot now complain that the government committed a material *Brady* violation. In sum, "the omitted evidence [does not] create a reasonable doubt [of petitioner's guilt] * * *." *Agurs, supra*, 427 U.S. at 112.

4. Petitioner further argues (Pet. 21-22) that the trial judge should have either struck allegedly prejudicial hearsay from the record or declared a mistrial. During the course of cross-examination, a defense witness testified that she overheard a conversation between Oschin and an attorney which may have implicated petitioner as well as Oschin in the kickback scheme (Tr. 31-22 to 31-23).[6] Assuming, arguendo, that the challenged testimony was inadmissible hearsay,[7] petitioner waived his right to relief by failing timely to object. Fed. R. Evid. 103(a)(1).[8]

The witness testified without objection at approximately eleven o'clock on the morning of May 25, 1977 (Tr. 35). At a hearing on a motion to strike orally raised

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[6]The witness stated that the attorney had told Oschin "[y]ou know the FBI's going to be in on it and *you'll all go to jail*" (Tr. 31-22) (emphasis added). "You all" did not necessarily include petitioner.

[7]It is arguable that this conversation occurred as part of the partnership's attempt to hide its misdeeds. If that were the case, the testimony might well be proper as an adoptive admission in furtherance of the conspiracy. See Fed. R. Evid. 801(d)(2)(B) and (E).

[8]Rule 103(a) provides in relevant part:

> (a) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) In case the ruling is one admitting evidence, *a timely objection or motion to strike appears of record*, stating the specific ground of objection, if the specific ground was not apparent from the context * * *. [Emphasis supplied].

some two and a half hours later, defense counsel stated that "[f]or tactical reasons we did not object to it when it came in" (Tr. 32). Instead, defense counsel "went back and took [the witness] on redirect and attempted to make whatever use he could of the situation" (Tr. 33). Since petitioner knowingly and intentionally waived his right to object, the trial court correctly denied petitioner's motion as untimely. *United States* v. *Rose*, 525 F. 2d 1026 (2d Cir. 1975), cert. denied, 424 U.S. 956 (1976); *Jenkins* v. *General Motors Corp.*, 446 F. 2d 377, 382-383 (5th Cir. 1971), cert. denied, 405 U.S. 922 (1972); *United States* v. *Wolff*, 409 F. 2d 413, 416 (7th Cir.), cert. denied, 396 U.S. 858 (1969); Fed. R. Evid. 103(a)(1). Furthermore, in light of the ambiguous nature of the reported conversation, its admission constituted harmless error.

5. Finally, petitioner challenges (Pet. 22-23) the district court's ruling that one of his exhibits was inadmissible hearsay evidence. The rejected document was a memorandum prepared by an outside investigator for petitioner in response to HUD's investigation of petitioner's corporation (Tr. 1982-1983). Such a statement was not regularly kept in the ordinary course of business, but rather constituted a document specially prepared for litigation purposes. Therefore, the trial judge correctly concluded that the proffered exhibit was not admissible as a business document under Fed. R. Evid. 803(6). See *Palmer* v. *Hoffman*, 318 U.S. 109, 111-114 (1943); *Hartzog* v. *United States*, 217 F. 2d 706 (4th Cir. 1954) (worksheets made in preparation for future income tax prosecution not admissible as business document) (cited with approval by Notes of Advisory Committee on Proposed Rules, Note to Paragraph 803(6)). In any event, the exhibit's exclusion was harmless error since the information contained therein was substantially elicited from the investigator (Tr. 1988) and other witnesses (*e.g.*, Tr. 875-877).



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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